No. 86-1340

In The

Supreme Court Of The United States

OCTOBER TERM, 1986

GILBERT R. RUSSELL AND
CRINCO INVESTMENTS, INC.,
Petitioners,

v.

SHEARSON LEHMAN BROTHERS INC.
F/K/A SHEARSON/LEHMAN AMERICAN
EXPRESS, INC., AND LEON BOMAR III,
Respondents.

RESPONDENTS' BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Are federal district courts barred from enforcing agreements to arbitrate a claim arising out of a contractual relationship if the claim is based upon the Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (1982) ("RICO")?

RULE 28.1 LIST

Non-Wholly Owned Subsidiaries and Affiliates of Shearson Lehman Brothers Inc.

Active Subsidiaries

Boston Hambro Corp.
Boulevard Investors Inc.
Boulevard Real Estate Corp.
Burlington Investors Inc.
E.B. Realty
Lombard Realty Corporation
Lowell Investors Inc.
Lowell Real Estate Corp.
Shearson Dat-Cheong Company Limited
Shearson Lehman/Amex Finanz A.G.
Shearson/KM, Inc.
Shearson/NGP Inc.

Inactive Subsidiaries

Genex Insurance Brokerage Ltd.
Mideast-American, Inc.

Affiliates

Banque Euorfin
Barony Company Ltd.
California S.A.
Carnegie Capital Management Company
Shearson Financial Services of Oklahoma, Inc.
Shearson Financial Services of Texas, Inc.
Shearson Lehman Brothers SARL
Intermodal Equipment Associates
KCC Syndicate Managers, Inc.
McLeod Young Weir Limited
New World Corporation
Rex Moor Properties Incorporated
Russell Energy Inc.
Sovran Energy Corp.

Non-Wholly Owned Subsidiaries and Affiliates of Shearson Lehman Brothers Holdings Inc., the parent company of Shearson Lehman Brothers Inc.*

American Express Asset Management Limited
American Express Asset Management N.V.
American Express Asset Management S.A.
American Express U.K. Holding Company Inc.
Dr Pepper Holding Company
FGIC Corporation
Kuhn Leob Lehman Brothers International B.V.
Lehman Brothers International UK Ltd.
Lehman International Finance N.V.
Lehman Overseas N.V.
LBKL 82-1 Investors Inc.
Shearson Lehman Broadgate North Inc.
Shearson Lehman Broadgate South Inc.
Shearson Lehman Brothers Limited
The McLeod Young Weir Corporation

* The parent company of Shearson Lehman Brothers Holdings Inc. is the American Express Company.

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Respondents Shearson Lehman Brothers Inc., ("Shearson") and Leon Bomar III, defendants below, respectfully pray that (a) a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed in part, reversed in part, vacated in part and remanded an Order of the United States District Court for the Northern District of Texas; and (b) upon issuance of a writ of certiorari, consideration of the Fifth Circuit decision be withheld pending the issuance of the Court's opinion in *Shearson/American Express Inc. v. McMahon,* No. 86-44 (U.S. 1986) (*"McMahon"*); and (c) to

the extent the issue presented here is unresolved by *McMahon,* that this Court resolve that issue in this case.

The district court enforced a pre-existing agreement between Shearson and petitioners/plaintiffs, who were customers of Shearson, to arbitrate all disputes arising out of their customer-broker relationship. The district court ordered arbitration of petitioners' claims brought under § 1964(c) of the Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (1982) ("RICO").

On appeal, the Fifth Circuit upheld the district court in part and ruled that district courts within its jurisdiction must enforce agreements to arbitrate RICO claims, following its earlier decision in *Mayaja v. Bodkin,* 803 F.2d 157 (5th Cir. 1986).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported. That opinion is reproduced in Petitioners' Petition for Writ of Certiorari. The opinion of the United States District Court for the Northern District of Texas is also reproduced in the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1986. A copy of the judgment is reproduced in the Petition. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

During 1982 and 1983, petitioners maintained securities accounts and commodities accounts with Shearson. When they opened their accounts, petitioners signed Customer

Agreements with Shearson, each of which provided for arbitration of any controversy relating to the accounts. A typical agreement provided in part:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc., and/or the American Stock Exchange, Inc. as I [the customer] may elect.

Petitioners traded actively in their Shearson accounts through May 1984 and incurred substantial losses, of which losses Appellants were regularly advised by Shearson. On November 22, 1985, nineteen months after the last transactions in their Shearson accounts, Petitioners filed this lawsuit against Shearson, its Fort Worth branch manager Leon Bomar, and Shearson's broker Waylon Max Nimmo.

Respondents moved for an order compelling arbitration of petitioners' claims, and the district court granted respondents' motion on March 10, 1986. *See* Appendix C to Petition for Writ of Certiorari. Petitioners appealed that order to the Fifth Circuit. Stating that petitioners' case involved nothing more than "well-settled principles of law," the Fifth Circuit declined to hear oral argument and summarily affirmed the district court's order compelling arbitration of petitioners' RICO claims, relying on its earlier decision in *Mayaja v. Bodkin*, 803 F.2d 157 (5th Cir. 1986) (*"Mayaja"*). The Fifth Circuit also reversed the district court's order compelling arbitration of petitioners' 1933 Securities Act and 1934 Securities Exchange Act claims. *See* Appendix C to Petition for Writ of Certiorari. Petitioners have requested

that this Court grant a writ of certiorari to review the Fifth Circuit's decision compelling arbitration of their RICO claims.

REASONS FOR GRANTING THE WRIT

In compelling arbitration of petitioners' RICO claims below, the Fifth Circuit relied on its decision on *Mayaja.* Respondents believe that decision is correct, but that this Court should grant certiorari to resolve the conflict among the Circuit Courts of Appeal. The Fifth Circuit's decision in *Mayaja,* mandating enforcement of agreements to arbitrate claims under RICO, is in direct conflict with the decision of the Eleventh Circuit in *Tashea v. Bache, Halsey, Stuart, Shields, Inc.,* 802 F.2d 1337 (11th Cir. 1986), and the decision of the First Circuit in *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.,* 806 F.2d 291 (1st Cir. 1986), which decisions refused to enforce agreements to arbitrate RICO claims.

As a result of the conflict in the circuits, this Court granted certiorari in *McMahon* and heard oral argument on that case on March 3, 1987. If the Court does not resolve the conflict in the circuits on the arbitrability of RICO claims in *McMahon,* Shearson respectfully requests that the Court do so in this case.

The Fifth Circuit's decision to arbitrate RICO claims conforms with recent decisions of this Court and with the clear mandate of Congress in the Arbitration Act, that all doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration. However, until the arbitrability *vel non* of civil RICO claims is resolved, parties to arbitration agreements will continue to be deprived of an efficient, expeditious, and less expensive alternative to federal courts for settling their disputes. Meanwhile, each passing day will

clog the courts with more motions raising this issue, and with more lawsuits asserting claims that should be determined through arbitration.

I. To the Extent the Question Remains Unresolved After *McMahon*, This Court Should Grant Certiorari to Decide Whether Congress Intended to Prohibit the Enforcement of Agreements to Arbitrate RICO Claims.

Congress enacted RICO principally to combat the infiltration of legitimate business by organized crime. *United States v. Turkette*, 452 U.S. 576, 591 (1981). In the years since its passage, however, the private cause of action under RICO has been "evolving into something quite different from the original conception of its enactors." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, ____, 105 S. Ct. 3275, 3287 (1985). "Racketeering" is becoming a basic claim in commercial disputes; ordinary customer complaints about their securities brokers are now RICO claims.[1] As the Seventh Circuit has observed, Congress inadvertently "may well have created a runaway treble damage bonanza for the already excessively litigious." *Schacht v. Brown*, 711 F.2d 1343, 1361 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

After an extensive examination of RICO's legislative history, the Fifth Circuit correctly recognized that the principal thrust behind RICO's private treble damages provision was

[1] "RICO claims are now added as a matter of course in virtually all cases challenging securities transactions." American Institute of Certified Public Accountants, "The Authority to Bring Private Treble-Damage Suits Under 'RICO' Should Be Reformed," *AICPA White Paper On Civil RICO* at 2 (July 31, 1985), *reprinted in* Oversight on Civil RICO Suits: Hearings on Oversight on Civil RICO Suits Brought Under 18 U.S.C. 1964(c) Before the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 251, 255 (1985) (hereinafter cited as *"AICPA White Paper"*).

compensatory, not punitive. *Mayaja*, 803 F.2d at 165. The Fifth Circuit found three currents of Congressional purpose impelling RICO's passage: first and foremost, the intent to compensate the victims of organized crime; second, to deter organized criminal activity; and third, to duplicate the remedies available under Section 4 of the Clayton Act. *Id.*

The Fifth Circuit went on to investigate the congressional purposes behind Section 4 of the Clayton Act, to determine their applicability to RICO's purposes. In doing so, the Fifth Circuit followed this Court's analysis in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346 (1985) (*"Mitsubishi"*):

> The Supreme Court in *Mitsubishi* thoroughly examined the legislative intent behind section 4 of the Clayton Act for the purpose of determining the arbitrability of section 4 claims. 105 S. Ct. at 3358-60. While acknowledging that "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators," *id.* at 3358, the Court held that "[n]otwithstanding its important incidental policing function, the treble-damages cause of action . . . seeks primarily to enable an injured competitor to gain compensation for that injury." *Id.* at 3359. Because the deterrent function was secondary to the compensatory function, the Court concluded that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 3359-60.
>
> *Mitsubishi's* reading of the legislative purpose of section 4 of the Clayton Act, recurrently invoked during the congressional discussion of RICO's private treble-damages provision, accords with our analysis of the legislative history of section 1964(c). The primary purpose of the section is to compensate those injured by organized

> crime; the section's secondary purpose is to deter racketeers from inflicting such injuries. *Paralleling Mitsubishi's analysis, we find no evidence that Congress implied that all RICO claims be non-arbitrable. Since plaintiffs may effectively vindicate their section 1964(c) cause of action in the arbitral forum, the congressional purpose behind section 1964(c) will continue to be served.*

803 F.2d at 165 (emphasis supplied).

All circuit courts do not share the Fifth Circuit's view. *See, e.g., McMahon v. Shearson/American Express Inc.*, 788 F.2d 94 (2d Cir.) *cert. granted,* ____ U.S. ____, 107 S. Ct. 60 (No. 86-44) (1986); *Tashea v. Bache, Halsey, Stuart, Shields, Inc.*, 802 F.2d 1337 (11th Cir. 1986); and *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986) (holding RICO claims predicated on mail and wire fraud statutes to be non-arbitrable).

Indeed, despite the Second, Third, and Eleventh Circuit Court's belief that the policies underlying RICO are too important to be left to arbitrators, the arbitration of civil RICO claims arising out of normal commercial relationships would have no effect on the types of claims RICO was meant to address: criminal actions, civil proceedings by the federal government pursuant to 18 U.S.C. § 1964(b), or lawsuits by private plaintiffs against mobsters attempting to

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[2] Unfortunately, as the New York Bar Association reported, "[c]ivil RICO has done literally nothing to advance Congress' goal of providing for 'an assault on organized crime and its economic roots.' This is hardly surprising: litigious through our society is, few would expect those injured in their businesses by the activities of 'the archetypal, intimidating mobster[s]' to serve summonses and complaints on such defendants." Committee on Federal Legislation, "Reform of the Private Civil Action Provision of RICO," 41 *The Record of the Association of the Bar of the City of New York* 412, 416 (May 1986) (footnotes omitted). Even rarer than a civil action against a member of organized crime would be a dispute between a mobster and a victim that was subject to an arbitration agreement.

infiltrate their business.[2] *See Ross v. Mathis*, 624 F. Supp. 110, 117 n.6 (N.D. Ga. 1985). Agreements such as the one at bar are struck at arms' length between parties to legitimate business transactions. There is no reason, either in public policy or Congressional intent, for district courts — rather than arbitrators — to be burdened with hearing these claims simply because a plaintiff has labelled them "racketeering."

The enforceability of agreements to arbitrate such claims is an open question, despite the lucidity and forcefulness of the Fifth Circuit's decision below. The strong trend of district court decisions since *Mitsubishi* was to direct arbitration of civil RICO claims.[3] However, since the Second, Third and Eleventh Circuits are now in conflict with the Fifth Circuit, District Courts will be rendering opinions inconsistent with one another. As the growing tide of RICO cases washes over the district courts, the conflict and confusion among the courts on this issue will only increase. In order to resolve this conflict at an early stage, this Court should grant certiorari to decide whatever questions remain concerning RICO's arbitrability after *McMahon*.

A. There Is a Conflict in the Circuit Courts As To the Arbitrability of RICO Claims.

This Court has never decided whether agreements to arbitrate civil RICO claims are enforceable. The Second, Third, and Eleventh Circuits have held that, to a greater or lesser extent, RICO claims are not arbitrable. The Fifth Circuit is the only circuit court of appeals to hold that *all* civil, commercial RICO claims are arbitrable. *Mayaja*, 803 F.2d at 166.

The issue has been intensely litigated in the district courts. At least 28 decisions have held that civil RICO

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[3] *See* Appendix F to Petition for Writ of Certiorari, *Shearson/American Express Inc. v. McMahon*, No. 86-44.

claims are arbitrable, while 19 decisions, many prior to *Mitsubishi,* have held that they are not. *See* Appendix F to Petition for Writ of Certiorari, *Shearson/American Express Inc. v. McMahon,* No. 86-44. In *Mitsubishi,* this Court corrected the mistaken assumption held by many district courts that antitrust claims could never be arbitrated. As this Court made clear, the dispositive question is whether Congress intended to exempt a particular claim from the requirements of the Arbitration Act. 105 S. Ct. at 3355.

Several of the district court decisions holding that RICO claims are not arbitrable were decided before *Mitsubishi,* and thus were based upon the assumption that antitrust claims could never be arbitrated. Analogizing RICO claims to antitrust claims, those courts concluded that RICO claims also could not be arbitrated.[4] The clear majority of the 39 district court cases deciding this issue since *Mitsubishi,* however, enforced agreements to arbitrate civil RICO claims. *See* Appendix F to Petition for Writ of Certiorari, *Shearson/American Express Inc. v. McMahon,* No. 86-44.

This Court's decision in *Mitsubishi* has had a compelling effect in the Fifth Circuit. The Fifth Circuit used *Mitsubishi* as its analytical framework for deciding *Mayaja:*

> In order for a statutory claim to overcome the overriding federal policy in favor of arbitration, *Moses H. Cone,* 460 U.S. at 24-25, it is necessary that the party

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[4] The antitrust analogy formed the basis for the leading pre-*Mitsubishi* decision regarding civil RICO arbitrability. *See S.A. Mineracao da Trindade-Samitri v. Utah Int'l Inc.,* 576 F. Supp. 566, 575 (S.D.N.Y. 1983), *order certified for interlocutory appeal,* 595 F. Supp. 1049 (S.D.N.Y.), *appealed on other grounds and affirmed,* 745 F.2d 190 (2d Cir. 1984). Other pre-*Mitsubishi* decisions adopted the reasoning of that decision. *See Ross v. Paine, Webber, Jackson & Curtis, Inc.,* No. C84-2311A (N.D. Ga. Mar. 29, 1985); *Witt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 602 F. Supp. 867, 870 (W.D. Pa. 1985); *Wilcox v. Ho-Wing Sit,* 586 F. Supp. 561, 567 (N.D. Cal. 1984); *Universal Marine Ins. Co. v. Beacon Ins. Co.,* 588 F. Supp. 735, 738 (W.D.N.C. 1984).

opposing the motion to compel produce evidence that Congress intended the statutory claim to be non-arbitrable. *See Mitsubishi,* 105 S. Ct. at 3355. A mere absence of evidence that Congress intended the claims to be arbitrated is insufficient to overcome the presumption in favor of arbitrability; the party opposing the motion must show that Congress intended to make an exception to the Arbitration Act of the statutory claim in question. As the Supreme Court instructed in its *Mitsubishi* opinion:

> Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by the Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable .... We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

Id. Thus, the task of a court in determining the arbitrability of a claim under the Federal Arbitration Act is, first, to examine the relevant statutory text and legislative history for express evidence that Congress intended the statutory claim concerned to be non-arbitrable. In many cases Congress may not have explicitly addressed the arbitrability question. In this event, the court must carefully examine the *congressional* policies promoting the enactment of the cause of action to determine whether, in light of these policies, an implicit congressional intention that the claims under the statute not be subjected to arbitration may be inferred due to the inability of these policies to be furthered if the claims are subject to arbitration.

Mayaja, 803 F.2d at 161 (citations omitted, emphasis in original).

The importance to the federal judiciary of enforcing the congressional policies behind agreements to arbitrate civil RICO claims is demonstrated by the growing number of such claims being brought in the federal courts. As this Court has noted, the number of civil RICO actions has risen dramatically each year since the statute's passage. *Sedima*, 473 U.S. at ____ & n.1, 105 S. Ct. at 3277-78 & n.1.[5] According to the Administrative Office of the United States Courts, which compiles the annual Judicial Workload Statistics, a total of 474 civil RICO cases were filed in the district courts between December 1, 1985 and April 30, 1986.[6] As litigants become more comfortable with charging "racketeering" in commercial disputes, the number of RICO claims will only increase. Each day that goes by ensures that more courts will be required to adjudicate commercial disputes that — under any other name but RICO — would be submitted to an arbitrator.

There is a direct conflict between the Fifth, Second, Third, and Eleventh Circuits over this issue. The confusion and conflict concerning the enforceability of agreements to arbitrate civil RICO claims should be resolved by this Court before the increasing volume of such claims threatens to overwhelm our court system. *See Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 (1980) (certiorari granted to forestall a possible conflict in the lower courts on an important issue); *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1964) ("a considerable number of

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[5] As the Court noted in *Sedima*, 473 U.S. at ____, 105 S. Ct. at 3277 n.1., according to the Report of the Ad Hoc Civil RICO Task Force, A.B.A. Section of Corp., Banking & Bus. Law at 55 (1985) (hereinafter cited as *"ABA Report"*), of the approximately 270 civil RICO trial court decisions between passage of the statute in 1970 and the end of 1984, 3% of the decisions were rendered in the decade of the 1970's and 43% in 1984.

[6] Communication from Elizabeth McGrath, Chief, Judicial Information Branch, Statistical Analysis and Reports Division, Administrative Office of the United States courts, Washington, D.C., dated June 27, 1986.

suits are pending in the lower courts which will turn on resolution of these issues"); *Comm'r v. Bilder*, 369 U.S. 499, 501 (1962) (citing "need for a uniform rule"); *see also New York v. Saper*, 336 U.S. 328, 329 (1949); *Shapiro v. United States*, 335 U.S. 1, 4 (1948).

B. The Fifth Circuit's Decision In This Case Is In Harmony With Congressional Intent, But the Conflict Among the Circuits Will Needlessly Burden the Courts and Litigants Unless the Fifth Circuit's Decision Is Reviewed and Affirmed.

The Fifth Circuit correctly analyzed Congressional intent in its decision. However, because other circuits do not adhere to this view, this Court should grant certiorari to resolve the conflict among the circuits.

1. The Fifth Circuit correctly held that there is no evidence that Congress intended to create an exception to the Arbitration Act for all civil RICO claims.

This Court stated in *Mitsubishi* that the strong national policy favoring arbitration requires the enforcement of agreements to arbitrate statutory claims unless Congress has expressed an intent to the contrary. *Mitsubishi*, 473 U.S. at ____, 105 S. Ct. at 3355.[7] The Fifth Circuit recognized and

[7] Indeed, with respect to rights expressly created by statute, such a rule is mandated by principles of statutory construction. "The cardinal rule is that repeals by implication are not favored." *Posadas v. Nat. City Bank*, 296 U.S. 497, 503 (1936); *see United States v. Will*, 449 U.S. 200, 221 (1980). Absent a clear and manifest expression of intention by the legislature to repeal its prior enactment, a subsequent statute will be construed as consistent with a prior statue, *See Posadas*, 296 U.S. at 503; *see also Randall v. Loftsgaarden*, ____ U.S. ____, 106 S. Ct. 3143 (1986); *Washington v. Miller*, 235 U.S. 422, 428 (1914). Because it contains no clear expression of Congressional intention to create an exception to the Arbitration Act, the RICO statute, enacted in 1979, should be construed as consistent with the Arbitration Act, in force since 1925.

applied that mandate in this case. Nothing in the language of the RICO statute, whether as originally enacted or subsequently amended, either explicitly or implicitly prohibits the arbitration of private RICO claims.[8] *Mayaja*, 803 F.2d at 164. Nor is there anything in the legislative history of RICO suggesting a Congressional intent to bar parties from agreeing to arbitrate RICO claims. *Mayaja*, 803 F.2d at 164-166. *Bob Ladd, Inc. v. Adcock*, 633 F. Supp. 241, 243-44 (E.D. Ark. 1986); *Bale v. Dean Witter Reynolds, Inc.*, 627 F. Supp. 650, 654 (D. Minn. 1986); *Sacks v. Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,429 at 92,642 (C.D. Cal. Dec. 31, 1985); *Brener v. Becker Paribas Inc.*, 628 F. Supp. 442, 449-50 (S.D.N.Y. 1985).

Unlike the Fifth Circuit's decision below, the Second Circuit's decision in *McMahon* contains no analysis of RICO's language or the statute's legislative history. Indeed, the Second Circuit did not even conclude that Congress, in enacting RICO, intended to carve out an exception to the Arbitration Act. The Second Circuit ignored *Mitsubishi*'s mandate and chose instead to create a judicial exception to the Arbitration Act, concluding that undefined "public policy" considerations barred arbitration of RICO claims. *McMahon*, 788 F.2d at 98-99. In so doing, the Second Circuit relied upon its own decision in *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), in which it held

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[8] Many of the courts that have held private RICO claims arbitrable, including the Fifth Circuit, have based their decisions, in whole or in part, upon the absence of a non-waiver provision in the RICO statute. *See Mayaja*, 803 F.2d at 164; *Bale v. Dean Witter Reynolds, Inc.*, 627 F. Supp. 650, 654 (D. Minn. 1986); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,276 at 91,899 (W.D. Pa. Apr. 19, 1985), *rev'd*, 797 F.2d 1197 (3d Cir. 1986); *Ross v. Mathis*, 624 F. Supp. at 116-17 & n.6; *Brener v. Becker Paribas Inc.*, 628 F. Supp. 442, 450 (S.D.N.Y. 1985).

that "the pervasive public interest in enforcement of the antitrust laws and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration." *Id* at 827-28.[9]

In reyling upon *American Safety,* the Second Circuit in *McMahon* completely ignored *Mitsubishi:* if Congress did not find public policy concerns sufficiently persuasive to create an exception to the Arbitration Act for the particular claim in question, then the Arbitration Act's strong public policy considerations must control. Indeed, the *Mitsubishi* Court expressed skepticism over the validity of *American Safety* in any setting. *See Mitsubishi,* 473 U.S. at ____, 105 S. Ct. at 3355-60.

The Fifth Circuit, however, followed *Mitsubishi's* prescription. As the Fifth Circuit stated in *Mayaja:*

> *McMahon* ignores *Mitsubishi*'s instruction that congressional intent governs the analysis of arbitrability of a statutory claim under the Arbitration Act. After *Mitsubishi,* "determining statutory claims to be non-arbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible." [*Jacobson v. Merrill Lynch,* 797 F.2d at 1202]. Since *McMahon* does not base its decision on a statutory interpretation of section 1964(c), we cannot follow its analysis. Moreover, we find *McMahon*'s reliance on *American Safety* misplaced. Although the Supreme Court did not explicitly overrule *American Safety* in the domestic context, *Mitsubishi* rejected so much of *American Safety*'s reasoning

[9] To the extent that the Second Circuit's decision in *McMahon* and decisions from other circuits are based upon the belief that arbitrators are unable to decide issues of fraud and complicated commercial disputes competently and fairly, those decisions ignore the long experience of the securities industry in arbitrating the very types of claims that are asserted in RICO complaints. *See* C. Katsoris, *The Arbitration of a Public Securities Dispute,* 53 Fordham L. Rev. 279 (1984).

> it is difficult to say what is left of the opinion to rely on. *See Mitsubishi,* 105 S. Ct. at 3357-60. Certainly the Court rejected that portion of *American Safety*'s reasoning relied upon by *McMahon. See id.* at 3359 ("Notwithstanding its important incidental policing function, . . . § 4 of the Clayton Act . . . seeks primarily to enable an injured competitor to gain compensation for that injury.").

Mayaja, 803 F.2d at 163, n.6. Any reliance upon *American Safety*'s obvious distrust of arbitration, rather than on an analysis of Congressional intent, requires reversal.

2. Civil RICO claims rarely implicate public policy because they almost always involve simple commercial disputes.

Even assuming the continuing vitality of *American Safety,* that case's rationale is irrelevant to the arbitrability of most civil RICO claims. The vast majority of these claims do not involve public policy any more than do state law claims of fraud, which may be arbitrated. *See Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 217 (1985). The district courts have come to recognize that "[t]he majority of civil RICO claims today do not impact on the general society or involve vital national interests . . ." *Bale,* 627 F. Supp. at 654. Commercial disputes that otherwise would involve only claims of breach of contract, securities law violations, or fraud are now framed as RICO claims. *Haroco, Inc. v. American Nat. Bank and Trust Co.,* 747 F.2d 384, 386-87 (7th Cir. 1984), *aff'd,* 473 U.S. 606 (1985) (per curiam); *see also The Supreme Court — Leading Cases,* 99 Harv. L. Rev. 120, 312-13 (1985) (the subject matter of private civil RICO actions in increasingly "'ordinary' commercial fraud").

This lawsuit is typical of the RICO action today. Petitioners' complaint alleges fraud based upon broker misrepresentations in their accounts; the "racketeering" activity in

petitioners' RICO claims is nothing more than the alleged misrepresentations that form the basis for the fraud claims. This is a classic example of plaintiffs' "Pavlovian inclusion of a RICO claim" in almost every securities lawsuit. *Huss v. Goldman, Sachs & Co.*, 635 F. Supp. 1227, 1228 (N.D. Ill. 1986). As the *Huss* Court noted, plaintiffs in securities cases "not only [assert] the standard claims under the 1933 and 1934 federal acts coupled of course with a state blue-sky law claim, but they now invariably also invoke [RICO]." 635 F. Supp. at 1227.

This type of "racketeering" claim is the rule, rather than the exception. RICO has become "essentially a federal business tort statute." *Bale*, 627 F. Supp. at 654, *see Bob Ladd, Inc.*, 633 F. Supp at 244 n.1., *Brener v. Becker Paribas Inc.*, 628 F. Supp. at 450; *West v. Drexel Burnham Lambert, Inc.*, 623 F. Supp. 26, 28-29 (W.D. Wash. 1985). A survey of trial court decisions conducted by the American Bar Association showed that 77% of all civil RICO cases reported involved securities fraud or mail or wire fraud in a commercial setting. *ABA Report* at 55-56. In that same survey, the ABA looked at 270 RICO lawsuits and discovered that broker-dealers were the primary defendants in at least 40 of the cases, banks were the primary defendants in 32 cases, and lawyers and accountants were defendants in 20 cases. *ABA Report* at 35 n.41. Another survey of 132 decisions in civil RICO cases indicated that 63 cases arose out of securities transactions or commodities trading, and other 38 cases arose out of commercial or contractual disputes. *AICPA White Paper* at 14-15.[10]

[10] RICO is currently, and very frequently, being utilized for purposes far afield from those envisioned by Congress. Not only has civil RICO been used against securities broker-dealers, commodities traders, investment bankers, commercial banks, financing institutions, insurance companies, manufacturing concerns, accounting firms and attorneys, *see ABA Report* at 35 & n.41, it has also been used outside the commercial world.

Many district courts with first-hand experience of RICO claims have concluded that such disputes can be resolved by arbitrators with no risk to public policy concerns. *See e.g., Steinberg v. The Illinois Co.*, 635 F. Supp. 615 (N.D. Ill. 1986); *Sacks*, Fed. Sec. L. Rep. ¶ 92,429 at 92,642; *see also West*, 623 F. Supp. at 29 ("there is no reason to pay lip service to a policy that justifies only a tiny minority of RICO cases").

Indeed, it is highly unlikely that the enforceability of arbitration agreements will ever arise in the types of cases that RICO was meant to address. A "contract" between "a shopkeeper [who] is approached by an organized crime henchman for protection money ... undoubtedly would not contain an agreement to arbitrate." *Ross v. Mathis*, 624 F. Supp. at 117 n.6.[11] There is thus no reason to hold that the public policy underlying RICO prevents civil RICO claims from being arbitrated. The Fifth Circuit's decision should be reviewed and affirmed as the rule for all federal courts.

See, e.g., Martin-Trigona v. D'Amato & Lynch, 559 F. Supp. 533 (S.D.N.Y. 1983) (legal assistance provided to *pro se* defendants in another action); *Pit Pros, Inc. v. Wolf*, 554 F. Supp. 284 (N.D. Ill. 1983) (landlord-tenant dispute); *Erlbaum v. Erlbaum* [1982] Fed. Sec. L. Rep. (CCH) ¶98,772 (E.D. Pa. July 13, 1982) (marital squabble); *Congregation Beth Yitzhok v. Briskman*, 566 F. Supp. 555 (E.D.N.Y. 1983) (religious dispute over control of congregation property); *King v. Lasher*, 572 F. Supp. 1377 (S.D.N.Y. 1983) (will contest).

[11] It is unlikely that claims involving the type of activity Congress intended RICO to address would be arbitrated for the additional reason that, under the Uniform Code of Arbitration, securities regulatory organizations have the right to decline the use of their arbitration facilities where the dispute "is not a proper subject matter for arbitration." Uniform Code of Arbitration § 1(b), N.A.S.D. Manual (CCH) § 3712(b). If this Court reversed the Second Circuit's *per se* rule, the lower courts could fashion a rule, such as the court applied in *West v. Drexel Burnham Lambert, Inc.*, 623 F. Supp. at 29, that the policy of enforcing arbitration agreements should prevail if the RICO claim "touches upon no great societal or public interest."

CONCLUSION

For the foregoing reasons, Respondents respectfully request that (a) this Court issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Fifth Circuit, (b) consideration of the Fifth Circuit decision be withheld pending the Court's decision in *McMahon,* and (c) to the extent the arbitrability of RICO claims is not resolved in *McMahon,* that the Court resolve that issue in the present case.

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CERTIFICATE OF SERVICE

This will certify that three true and correct copies of the foregoing Respondents' Brief on Petition For Writ of Certiorari have been sent, by certified mail return receipt requested, to counsel of record for petitioners, James A. Flynn, Lambos, Flynn, Nyland & Giardino, 29 Broadway, 9th Floor, New York, New York 10006.